

Message

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Subject: FYI Inside epa on transparency rule

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Critics Urge Biden, Not Congress, To Rescind Trump EPA Science Rule

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House science committee Chairman Eddie Bernice Johnson (D-TX) is joining other critics of the Trump EPA's science transparency rule in urging the Biden administration to quickly unwind the policy by administrative action and, if necessary, litigation, rather than having Congress rescind it using the Congressional Review Act (CRA).

"EPA cannot be fully restored to its necessary role as a champion of the nation's environment unless the Trump Administration's worst initiatives to sabotage the Agency are swept away," Johnson writes in a Jan. 7 letter to President-elect Joe Biden, before highlighting one of the Trump EPA's "most pernicious" efforts, the science transparency rule.

"I urge you to move swiftly on Day One against this rule, and to use all legal and administrative means at your disposal to do so."

Johnson's statement appears to signal that lawmakers are not planning to use the CRA to repeal the controversial rule through legislative action -- avoiding a likely heated political debate in a narrowly divided Senate as well as use of a deregulatory tool that many environmentalists would rather not lend credence to by invoking it even in an effort to rescind a Trump administration regulation they hope to repeal.

Instead, they plan to push the Biden EPA to unwind it using administrative authority, though some opponents will almost certainly sue over the rule.

The rule requires EPA to favor studies where the underlying dose-response data is available for validation. EPA Administrator Andrew Wheeler says it will help officials address growing concerns over how it is evaluating chemicals under the TSCA program.

But environmentalists charge it is unlawful, would open the door to disclosing confidential health data and would severely limit the agency's ability to rely on a range of studies needed to justify stringent standards. As a result, they have urged the incoming Biden administration to make the rule's rescission a top priority.

But their choice of tactics to repeal the science rule reflects a broader debate among environmentalists and others over how best to rescind several Trump rules.

For instance, James Goodwin, senior policy analyst at the Center for Progressive Reform (CPR), says that there are ongoing conversations over how best to roll back several Trump-era rules including the science policy. And while "at this point all options on the table," he says, he favors an administrative approach or legal challenge for the science rule -- or both, a view shared by Sean Hecht, co-director of UCLA's Environmental Law Clinic.

Hecht said it would be "very unfortunate" if the CRA were used to reverse the rule because it could block EPA from issuing a new rule in future "that actually deals with the issues" involved, if it chose to do so, because of the law's language barring later issuance of substantially similar rules.

Goodwin says an administrative repeal could also happen very quickly -- rather than going through the months- or even years-long process that usually accompanies major rulemakings -- because the Trump EPA based the final rule on a federal housekeeping statute and has declared it a rule of internal agency procedure rather than a substantive rule.

Administrative Procedure

As a result, Wheeler has argued that the rule is shielded from both CRA repeal and the Administrative Procedure Act's (APA) otherwise mandatory notice-and-comment process, though the agency did hold two comment periods and received more than 500,000 comments on the controversial proposals.

Goodwin notes that the APA "has a similar concept of procedural rules" to the CRA, and that those actions "are exempt from APA. EPA went through a couple of notice and comment periods where they were at great pains at saying [the rule was] simply procedural."

He continues, "If we take Wheeler at his word, that it's procedural . . . [the Biden Administration doesn't] need notice and comment to remove the rule. Biden would, in theory, be perfectly allowed to go through [repeal] without notice and comment."

Goodwin says the administrative approach would also avoid the hurdles of using the CRA. The law sets up an expedited process for repeal of recent agency regulations or guidance, requiring just a majority vote in both chambers followed by the president's signature, but it must be used within 60 "legislative days" of the challenged rule's release.

The law has so far only been used by congressional Republicans to repeal rules crafted at the end of various Democratic administrations and many environmentalists have been reluctant to use it -- even if seeking to repeal a Trump deregulatory rule -- fearing it would set a precedent that could undermine future efforts to challenge the law.

Avoiding use of the CRA in the case of the science rule would also avoid use of floor time in both chambers of Congress and the need to secure a majority in the 50-50 Senate.

Former Clinton-era toxics chief Jim Aidala says that whether CRA action is viable may come down to whether Sen. Joe Manchin (D-WV), widely seen as the swing vote in an evenly split Senate, favors it -- which could be a slim branch on which to hang hopes of repealing the policy.

But other voices are warning that a swift administrative action might not be realistic and say a lengthier process could be necessary to ensure the repeal will survive possible court challenges.

One environmental attorney says that while the legal arguments underlying the final rule seem to support a speedy rollback, officials should be cautious about basing any action on Trump-era positions that opponents have attacked as shoddy, contradictory or outright incorrect.

"If the Biden administration were to rely on that reasoning, undoubtedly they would be sued," the source says.

Moreover, the attorney continues, Trump-era legal reasoning has fared poorly in court so far, and efforts to roll back the administration's policies could face resistance from conservative judges who favor strict limits on EPA's authority. "If I were the incoming administration, I wouldn't want to rely on the Trump EPA's legal reasoning."

Rather, the source continues, the Biden administration should instead look to its predecessor as an example of how not to approach rulemaking, and instead make sure to "dot every 'i' and cross every 't'" even if it delays the process.

"That's one of the lessons from the Trump administration -- that if you do things in a shoddy, illegal way, it doesn't hold up," the attorney says. "There may be ways, there may be shortcuts . . . if there are shortcuts they should take them, but if it takes some time to do this so it holds up in court, they should do that."

Court Challenges

But Goodwin and Hecht say any court challenge based on the argument that repeal must go through a full APA process would risk backfiring on the rule's defenders. "[T]o make that argument, they have to concede it's substantive. They just admitted there is no valid basis for the rule and set themselves a trap," Goodwin says.

"Advocates of this rule are kind of stuck between those two arguments," Hecht says. "Either way, it's very hard to defend this rule."

The Biden EPA could also adopt several other administrative approaches, such as declining to implement the rule until they have revoked it, Goodwin says. There is "some precedent, for strictly procedural rules ... an agency has a lot of flexibility not to enforce a rule. If I'm the Biden EPA and I have this rule and blatantly do not follow it while issuing [other] rules, it's not clear that somebody could challenge that or hold me accountable in court," he says.

Additionally, he said Biden's EPA administrator-designate, North Carolina environment chief Michael Regan, could invoke a controversial provision that gives the agency's head authority to exempt studies from the rule -- language that Wheeler took pains to defend when he unveiled the policy.

Goodwin suggested Regan could apply that loophole as a blanket approach or on a case by case until it is undone. "There's a lot the Biden EPA can do," he says. "They can defang it from the get-go and then figure out the best way to get it off the books."

Another source, who has closely followed the rule's progress, says that regardless of Democrats' plans to reverse the rule numerous groups are already preparing to bring court challenges. Some, including the Environmental Defense Fund and New York Attorney General Letitia James (D), have already issued public statements to that effect.

This source said litigation could be a faster approach to scrapping the rule than any administrative repeal, in part because it will be only one entry on a long list of Trump-era rules the Biden EPA has vowed to undo.

In particular, the source says the new administration's climate focus will likely make lenient rules on greenhouse gas emissions from power plants and motor vehicles its top targets.

"Those are the two things [President Barack] Obama got done to make progress on climate change that got substantially changed in this [Trump] administration and they'll want to turn those around and get them back. Neither will be a light lift, [EPA will] have to do re-analyses," the source says. "It's question of whether the subset of legal offices at EPA specialize in APA and they can only deal with so many rules at one time. I don't know. That would be the issue."

Moreover, the source notes that the science rule is one of the few policies -- if not the only one -- developed at EPA's Office of Research and Development (ORD), which generally has no regulatory role. The office has also lacked a Senate-confirmed head for eight years and is usually a low priority for new administrations. If that trend continues, ORD could be without a leader to advocate for making the science rule a top target for action.

"For internal priority setting this could matter," the source says.

Lawsuits could bypass that process and would also give the Biden administration an opportunity to seek voluntary judicial remand of the science rule rather than awaiting a decision on the merits of a court challenge. -- Maria Hegstad (mhegstad@iwpnews.com) & David LaRoss (dlaross@iwpnews.com)

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